

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35527

STATE OF IDAHO,)	2009 Unpublished Opinion No. 711
)	
Plaintiff-Respondent,)	Filed: December 3, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
BETHANY ANNE McHALE,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

Judgment of conviction for possession of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Bethany Anne McHale was found guilty of possession of methamphetamine following a jury trial. McHale appeals her judgment of conviction, arguing that trial evidence of her prior use of methamphetamine was admitted erroneously because the State did not give timely notice of its intent to use the evidence and because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We affirm.

I.

BACKGROUND

In June 2007, Boise Police Officer Josh Arend observed McHale near a dumpster behind a closed business and approached her to investigate her reasons for being there. Upon questioning by Officer Arend, McHale admitted that she had used methamphetamine recently. (At McHale's trial, Officer Arend could not recall at trial whether McHale had said her last use was two days or two weeks earlier.) McHale also admitted that there might be baggies with

methamphetamine residue in her car. Subsequently, a drug dog alerted on McHale's car, and a search was then conducted that revealed two baggies containing methamphetamine residue. The search also revealed four spoons believed to have methamphetamine residue on them, though the spoons were never tested.

McHale was charged with possession of methamphetamine and possession of drug paraphernalia. The district court thereafter issued a scheduling order that stated, "In the event that either party intends to introduce evidence pursuant to I.R.E. 404 . . . that party must disclose such evidence to opposing counsel on or before the pre-trial conference." Trial was scheduled for May 12, 2008, and pretrial hearings were conducted on April 30 and May 2. On May 2, the State filed and served a notice that it intended to use at trial McHale's admissions to Officer Arend that she had used drugs recently. McHale opposed the admission of this evidence on the grounds that the notice was untimely, the evidence was not relevant, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. At a hearing on May 12, the first day of trial, the district court held that the notice was timely and that the evidence was admissible.

The jury found McHale guilty of possession of a controlled substance, but acquitted her of possession of paraphernalia. McHale appeals the resulting judgment, arguing that the district court erred when it allowed the evidence of her admission to Officer Arend that she had recently used methamphetamine.

II.

DISCUSSION

A. Timeliness of Notice

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show that she acted in conformity therewith, but such evidence may be admitted if it is relevant for other purposes. Idaho Rule of Evidence 404(b); *State v. Grist*, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009). Rule 404(b) provides that when the prosecution wishes to introduce such evidence in a criminal case, the prosecution "shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." The purpose of this notice requirement is to reduce surprise and to promote early resolution of admissibility issues. *State v. Sheldon*, 145 Idaho 225, 230, 178 P.3d 28, 33 (2008). A prosecutor's failure to

comply with the notice requirement renders the evidence inadmissible at trial. *Id.* The question whether the notice was provided “reasonably” in advance of trial, or whether pretrial notice should be excused “for good cause shown,” is a discretionary determination for the trial court, and we therefore review the trial court’s decision for an abuse of discretion. *Cf. Montgomery v. Montgomery*, 147 Idaho 1, 6, 205 P.3d 650, 655 (2009) (Evidentiary rulings by the trial court are reviewed for an abuse of discretion.); *State v. Hoover*, 138 Idaho 414, 419, 64 P.3d 340, 345 (Ct. App. 2003) (same).

We find no merit in McHale’s argument that the State’s notice here was not timely under Rule 404(b) merely because the notice did not comply with the pretrial scheduling order. The I.R.E. 404(b) notice requirement and a trial court’s scheduling order impose separate requirements, and the trial court acted within its discretion in holding that a notice that violated its scheduling order by two days could still be sufficient to comply with Rule 404(b).

In addressing the timeliness issue, the district court focused heavily on the fact that the State had previously disclosed the evidence to McHale. The court emphasized that McHale’s admission to prior methamphetamine use was contained in a police report and in an audio recording that had been made available to the defense, and was also mentioned in testimony at her preliminary hearing. It is unclear from the district court’s comments whether the court was implying that disclosure of the evidence is enough to serve as Rule 404(b) notice, or was holding that notice ten days in advance of trial was sufficient in this case because no undue surprise could have occurred in view of McHale’s prior knowledge of the evidence. Because of this ambiguity, we emphasize that mere disclosure of the existence of evidence does not satisfy the I.R.E. 404(b) notice requirement. It is the prosecutor’s intent to *use* the evidence, not just its existence, that must be disclosed in a Rule 404(b) notice.

This ambiguity in the district court’s ruling notwithstanding, we hold the court did not abuse its discretion in determining that the notice was timely. McHale has not shown that the timing caused any unfair surprise or impaired her ability to meet the evidence at trial. Given the nature of the evidence in question--a recording and other evidence of McHale’s own statement--and her longstanding knowledge of its existence, notice served ten days before trial was ample to satisfy the Rule 404(b) requirement that notice be given “reasonably in advance of trial.”

If and to the extent that McHale is also arguing that her admission of prior drug use should have been excluded from evidence as a sanction for the prosecutor’s violation of the

court's scheduling order, we find no error. Where late-disclosed prosecution evidence has been admitted despite the defendant's objection, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of her defense that she was prevented from receiving a fair trial. *State v. Byington*, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999); *State v. Allen*, 145 Idaho 183, 185, 177 P.3d 397, 399 (Ct. App. 2008). As explained above, McHale has not shown that the State's disclosure of intent to use this evidence ten days in advance of trial, rather than two days earlier as mandated by the scheduling order, prejudiced her preparation or presentation of her defense.

B. Danger of Unfair Prejudice

When considering a proffer of evidence of a defendant's other crimes or misconduct, the trial court must first determine whether there is sufficient evidence from which a jury could reasonably conclude that the wrongful act occurred, and whether the evidence is relevant to a disputed material issue concerning the charged crime. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; *State v. Scovell*, 136 Idaho 587, 590, 38 P.3d 625, 628 (Ct. App. 2001). If the court finds it relevant for a purpose not prohibited by I.R.E. 404(b), the court must next determine whether this probative value is substantially outweighed by the danger of unfair prejudice. I.R.E. 403, *Grist*, 147 Idaho at 52, 205 P.3d at 1188.

McHale does not dispute that her admission of past methamphetamine use was probative to show her knowledge that the substance in the baggies was methamphetamine residue. She argues only that the trial court abused its discretion in applying the Rule 403 balancing test. McHale argues in a conclusory fashion that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the evidence could lead the jury to convict her merely because of her prior drug use.

We find it unnecessary to resolve this issue, for even if admission of the evidence was improper, the error was harmless. An evidentiary error is harmless when the reviewing court can conclude beyond a reasonable doubt that the jury would have reached the same result if the challenged evidence had not been admitted. *State v. Grantham*, 146 Idaho 490, 498, 198 P.3d 128, 136 (Ct. App. 2008). Here, there was trial evidence of McHale's other statement to the officer--that the vehicle "might" contain baggies with methamphetamine residue. The latter statement plainly expressed McHale's knowledge of the content of the baggies that were later

found by the officers. Therefore, we are confident beyond a reasonable doubt that the asserted error in admitting McHale's confession of prior drug use did not affect the verdict.

III.

CONCLUSION

The judgment of conviction is affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**